82-6579

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Supreme Court, U.S.
FILED
APR 11 1983
Alexander L. Stevas, Clerk

WILLIE LLOYD TURNER,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioner
John C. Lowe
J. Lloyd Snook, III
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901
(804) 296-8188

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QUESTION PRESENTED

Was the representation afforded Petitioner by trial counsel within the range of competence demanded of attorneys in criminal cases, as required by the Sixth and Fourteenth Amendments to the United States Constitution?

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Other Authorities:

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JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), in that Petitioner claims that his conviction violated the Sixth and Fourteenth Amendments of the United States Constitution. The order of which review is sought is the order denying Petitioner's Petition for Appeal in the Virginia Supreme Court, dated January 11, 1983.

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved in this Petition for Writ of Certiorari are the following:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. CONST. AMEND. VI

> All person born or naturalized in the United States . . . are citizens of the United States of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

U.S. CONST. AMEND. XIV.

STATUTES INVOLVED

The statutory provision involved here is Va. Code Ann. §19.2-264.4 (Cum. Supp. 1977):

> A. Upon a finding that the Defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the Defendant shall be sentenced to death or life imprisonment . . .
>
> B. . . . Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the Defendant, and any other fact in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: . . .
>
> (ii) the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance or...

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(iv) at the time of the commission of the capital felony, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

STATEMENT OF THE CASE

Procedural Posture

According to the evidence adduced at trial, the offense of which your Petitioner was convicted occurred as follows:

On July 12, 1979, Willie Lloyd Turner walked into Smith Jewelers, in Franklin, Virginia, brandishing a sawed-off shotgun. He demanded that Jack Smith fill up some bags of jewelry; Smith triggered the silent alarm and moments later, Alan G. Bain, Jr., a police officer in the City of Franklin, entered the jewelry store. Turner disarmed him, and told him to stand in the back of the store with the other customers who had been in the store when the robbery began. As Smith filled bags with jewelry, Turner, hearing police sirens, became panicky. Turner fired Bain's service revolver at the back wall; as the sirens continued, Turner filed the revolver at Smith, grazing his scalp, causing only a superficial wound. Smith fell to the floor.

In the confusion, one customer and one employee were able to sneak out the front door. Turner apparently became panicky again, and shot Smith, who was lying on the floor, twice in the back. According to the medical examiner, either of the two bullets would have been fatal. Officer Bain testified that

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the two fatal shots were fired "in rapid succession." After the two shots were fired, Officer Bain attacked Turner, disarmed him, and placed him under arrest.

Turner was brought to trial on December 3, 1979, and was found guilty on December 4, 1979, of numerous related non-capital felonies, and capital murder, to-wit: murder in the commission of a robbery while armed with a deadly weapon, in violation of Va. Code Ann. §18.2-31. On December 5, 1979, the sentencing phase of the trial began, and on December 6, 1979, the jury recommended the death penalty, which was then imposed on February 6, 1980.

On direct appeal, the conviction and sentence were affirmed by the Virginia Supreme Court. Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. denied 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

Petitioner filed a Petition for Writ of Habeas Corpus in the Circuit Court for the County of Southampton on September 9, 1981; on November 10, 1981, oral argument was heard on Respondent's Motion to Dismiss and Petitioner's Motion for Plenary Hearing. No evidence was presented at that time, though Petitioner proffered evidence in support of his request for a plenary hearing on the issue of ineffective assistance of counsel. That proffer is enumerated in the Statement of Facts, filed by Judge Godwin with the record in this case. In that proffer, counsel offered to prove, in support of Petitioner's claim of ineffective assistance of counsel, that:

1. Defense counsel did not consult other psychiatrists or psychiatric experts in an effort to inform themselves about the psychiatric issues involved in this case.

2. The only background research performed by defense counsel on psychiatric issues in preparation for trial was to review selections from the American Psychiatric Association's Diagnostic and Statistical Manual, which had been sent to counsel

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by Dr. Bransfield with his letter of January 19, 1979.

3. Counsel did not research the prognostic implications of Dr. Bransfield's diagnosis.

4. Counsel did not research the case law of other states -- notably California -- in which the mitigating circumstances enumerated in the death penalty statute were defined.

5. Counsel did not prepare jury instructions defining the terms "extreme mental or emotional disturbance" or "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

On January 4, 1982, Judge Godwin issued a letter opinion, indicating that he would grant Respondent's Motion to Dismiss without holding a plenary hearing, finding affirmatively that defense counsel at trial had rendered effective assistance of counsel. On February 10, 1982, the trial court entered an order dismissing the Petition for Writ of Habeas Corpus, to which Petitioner timely objected. A Petition for Appeal was timely filed in the Virginia Supreme Court, which Petition was denied by order dated January 11, 1983. In that Order, the Supreme Court of Virginia, applying the standard of McMann v. Richardson, 397 U.S. 759 (1970), and Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978), affirmed the trial court's finding on the merits of the constitutional claim. It is from the entry of that Order that this Petition for Writ of Certiorari is taken.

Facts Concerning Ineffective Assistance of Counsel

The Court having ruled without permitting the presentation of evidence, and having accepted the proffer of Petitioner's counsel, the facts as alleged in Petitioner's proffer must be taken as true for the purposes of this review.

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Likewise, the allegations made in the Petition for Writ of Habeas Corpus must be taken as true for the purposes of this review.

There being no evidence to offer to make a defense on the issue of guilt or innocence, the only issue at trial concerned possible mitigating or aggravating circumstances, and the decision to impose the death sentence. Defense counsel's strategy in presenting mitigating evidence appeared to be two-pronged. First, Dr. Robert Bransfield, a psychiatrist who had examined Petitioner, testified on direct examination that he believed that Petitioner was under the influence of a mental disturbance when he committed the crimes involved here. Second, three members of Petitioner's family were presented, apparently for the sole purpose of "humanizing" the Defendant.

On cross-examination, Dr. Bransfield's testimony was turned against Petitioner. The "mitigating" evidence in fact became "aggravating" evidence, as Dr. Bransfield's testimony was used by the prosecution to establish a psychiatric predicate for the future dangerousness decision. Defense counsel was not aware that the diagnosis given by Dr. Bransfield was susceptible of an aggravating interpretation.

ARGUMENT I

THE TRIAL COURT ERRED IN CONCLUDING, WITHOUT THE PRESENTATION OF EVIDENCE, THAT PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS TRIAL.

Petitioner's Petition for Writ of Habeas Corpus alleged that Petitioner had been denied the effective assistance of counsel at his trial. The Petition specified, inter alia, the following grounds for that allegation:

1. Counsel failed to submit proposed instructions and to take other steps to be sure that the jury was properly and thoroughly instructed on the definitions and burdens of proof relating to aggravating and mitigating circumstances at the

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sentencing hearing.

2. Counsel failed to develop and present adequately the psychiatric evidence sufficient to support a finding of the presence of mitigating mental abnormalities.

Petition for Writ of Habeas Corpus, p. 20.

In addition, counsel for Petitioner, at oral argument on November 10, 1981, proffered to the court that Petitioner's evidence would show that:

1. Trial counsel had not consulted with any psychiatrists or psychiatric texts in an effort to learn about the psychiatric issues involved in the case, and

2. Trial counsel had not adequately researched comparable capital murder statutes in other jurisdictions regarding the definition and application of the mitigating factors set forth in Va. Code Ann. § 19.2-264.4(B) (1977 Cum. Supp.).

Statement of Facts, p. 2.

The trial court conducted its own review of the record of the case, and, in its letter opinion, stated that it found no merit in Petitioner's claims. It is important to note that neither the Commonwealth nor the trial court contend that the allegations in the Petition are not sufficiently specific to be grounds for habeas corpus relief; the court found the allegations sufficient, but denied the Petition on the merits of the claim.

These allegations clearly involve matters not of record in the original trial. The court would find nowhere in the record anything dealing with the preparation of trial counsel on the psychiatric issues. In death penalty cases, of course, the preparation of the psychiatric issues is often the major preparation to be undertaken. That would be particularly true in a case such as this, in which there can be no serious question about the guilt of the Petitioner. The only significant issue

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would then be the appropriate sentence.

Petitioner has suggested, through the Petition and through proffers to the court on November 10, 1981, some specific ways in which counsel's performance was inadequate. The facts that would substantiate those allegations are not of record.

This Court has often noted that matters of ineffective assistance often will not be apparent from the face of the record. On a different issue, Chief Justice Burger noted that the problem with ineffective assistance from joint representation is in what the advocate does not do. Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978). In many of the cases of ineffective assistance of counsel, the basis for the finding of ineffective assistance was the failure of counsel to investigate certain defenses. See, e.g., Brennan v. Blankenship, 472 F.Supp. 149 (W.D.Va. 1979); Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978); in these cases, the federal courts reversed convictions expressly because counsel did not adequately explore and develop psychiatric defenses.

In the instant case, of course, counsel made efforts to present evidence in mitigation, though the effort backfired badly. Dr. Bransfield's testimony consisted of the presentation of an opinion that Petitioner was suffering from "extreme mental or emotional disturbance" at the time of the offenses, without any explanation of that conclusion. On cross-examination, Dr. Bransfield's diagnosis of Petitioner was turned around, and that diagnosis was used to portray Petitioner as a person who would continue to be dangerous in the future.

To say that trial counsel took a tactical gamble in their decision to put on Dr. Bransfield does not answer the question of ineffective assistance of counsel. The question, under federal law, is whether that tactical gamble "resulted from neglect or ignorance rather than from informed, professional deliberation. Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir.

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1977), cert. denied, 438 U.S. 1011 (1978); McMann v. Richardson, 397 U.S. 759, 770-71 (1970). If thoroughly informed and prepared counsel concluded, after consideration of all of the choices, that Dr. Bransfield was the only hope, then Petitioner's claim has no merit.

However, Petitioner proffered to the trial court at the November 10, 1981, hearing that the evidence would be that trial counsel had not consulted other psychiatrists or psychiatric texts in preparation for trial. The significance of this omission is that counsel did not know how dangerous Dr. Bransfield's testimony was. Under case law that was developing at that time, and under generally accepted principles of psychiatry, psychiatric "predictions" of future dangerousness are not in fact predictions at all, and are not matters of expert testimony. See Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), aff'g 445 F.Supp. 647 (N.D.Tex. 1978), aff'd sub nom. Estelle v. Smith, 451 U.S. 454 (1981); American Psychiatric Association, Clinical Aspects of the Violent Individual (1974). The Commonwealth's Attorney could not have done on his own initiative what defense counsel was permitting him to do -- to use Dr. Bransfield to establish a psychiatric predicate for future dangerousness.

Did trial counsel know about Smith v. Estelle, either in the District Court or in the Circuit Court? Was counsel aware of the prognostic implications of Dr. Bransfield's comments? Was counsel aware that he might be opening Petitioner up to the presentation of evidence that the Commonwealth would not otherwise have been able to present? These are the sorts of issues that are involved in this inquiry, without the answers to which it cannot be said, as a matter of law or based on the record in front of Judge Godwin, that Petitioner was afforded the constitutionally adequate and effective assistance of counsel.

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It is important to remember that Judge Godwin ruled, on the basis of his own re-examination of the trial record, that Petitioner had received the effective assistance of counsel. However, without having conducted a plenary hearing on the subject, Judge Godwin could not make such a determination. The general rule governing the necessity for plenary hearings is as follows:

> [W]here the petition or motion contains allegations of fact as to matters not shown in the record which, although perhaps improbable, are not incredible, a hearing is required.

39 Am.Jur.2d, Habeas Corpus, §143 (1968). The law in Virginia follows this general rule.

> The general rule is that a hearing must be granted where the petition for a writ of habeas corpus alleges facts that, if proven, constitute grounds for relief.

9A M.J., Habeas Corpus §23 (1977), citing Near v. Cunningham, 313 F.2d 929 (4th Cir. 1963). In Near, the Fourth Circuit held that a petitioner is entitled to a hearing where he raises issues not capable of resolution on the record alone, and where the issues so raised are not frivolous or patently false.

The allegations of ineffective assistance of counsel are not frivolous or patently false. At the very least, a plenary hearing must be held before the allegations can be ruled on. As was noted above, an allegation of ineffective assistance of counsel, particularly where the error alleged is a sin of omission rather than commission, most often must be established from sources not already in the record, as it is a rare omission indeed that is so blatantly obvious as to be apparent from this record.

Since this case comes to this Court on appeal from a denial of a petition for writ of habeas corpus sought in state court, and since the record is not sufficient to establish, as a matter of law, that Petitioner was denied the effective assistance of counsel, the appropriate remedy is to remand the

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case to the trial court for an evidentiary hearing on the issue. Strong reasons of federal policy such as federalism, comity and judicial economy require that this plenary hearing be held in state court, rather than federal court. It is important, in the first instance, that Judge Godwin be given the opportunity to review the case; his judgment, incorporating his familiarity with counsel and with the case itself, would be informed in a way that no federal district judge's opinion could be.

This Court has suggested that it is important that the state courts truly and fairly adjudicate issues of federal constitutional law. As Mr. Justice Powell wrote in Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1972) (Powell, J., concurring):

> It is the solemn duty of [state] courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law. The task which federal courts are asked to perform on habeas is thus most often one that has or should have been done before. The presumption that "if a job can be well done once, it should not be done twice" is sound and one calculated to use best "the intellectual, moral, and political resources involved in the legal system."

Mr. Justice Powell noted the increasing caseloads in the federal courts, and suggested that the federal system would be better served if the state courts were given a pre-eminent position in the safeguarding of federal constitutional rights.

Of course, state courts may refuse to consider federal constitutional issues at all; however, the interests of federalism would be best served if this Court were to at least encourage, if not require, state courts to seriously address federal constitutional claims.

The fact that federal habeas corpus is available as a remedy does not preclude this Court from requiring that state courts afford a full and fair opportunity for the Petitioner to present his claims. This Court has often remanded cases to state courts for an evidentiary hearing after the state courts had

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denied such an evidentiary hearing once before. Wilde v. Wyoming, 362 U.S. 607 (1960); Sublett v. Adams, 362 U.S. 143 (1960); Cash v. Culver, 358 U.S. 633 (1959); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Palmer v. Ashe, 342 U.S. 134 (1951); Hawk v. Olson, 326 U.S. 271 (1945); Pyle v. Kansas, 317 U.S. 213 (1942); Cochran v. Kansas, 316 U.S. 255 (1942); Smith v. O'Grady, 312 U.S. 329 (1941).

Consistent with its interests in federalism, comity, time and judicial economy, this Court should remand to the Circuit Court for the County of Southampton for the taking of evidence on the question of ineffective assistance of counsel.

CONCLUSION

Petitioner prays this Court to remand the case to the Circuit Court for the County of Southampton, so that an evidentiary hearing may be held on the question of ineffective assistance of counsel.

WILLIE LLOYD TURNER

By Counsel

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MAILING CERTIFICATE

I, J. Lloyd Snook, III, a member of the bar of this Court, make oath that, on or before April 11, 1983, I caused this Petition for Writ of Certiorari to be deposited in a United States Post Office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2. I further make oath that I caused one copy of the above-mentioned document to be sent to Robert H. Anderson, III, Assistant Attorney General, 101 North Eighth Street, Richmond, Virginia, 23219, by depositing the documents in the United States Post Office or mailbox, with first class postage prepaid.

J. Lloyd Snook, III

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NOTARIAL CERTIFICATE

STATE OF VIRGINIA

AT LARGE, to-wit:

The foregoing instrument was subscribed and sworn before me on this 11th day of April, 1983.

Notary Public

My commission expires: May 7, 1983

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 11th *day of* January, 1983.

Willie Lloyd Turner, Appellant,

against Record No. 820828
Circuit Court No. CL-195-81(H.C.)

Edward C. Morris, Superintendent,
Mecklenburg Correctional Center, Appellee.

From the Circuit Court of Southampton County

Upon review of the record in this case and in consideration of the arguments made in support of and in opposition to the granting of an appeal, and applying the standard of McMann v. Richardson, 397 U.S. 759 (1970), and Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977) cert. denied 435 U.S. 1011 (1978), the court is of opinion that the trial court did not err in dismissing appellant's allegation XII upon a review of the record without taking additional evidence. Arey v. Payton, 209 Va. 370, 164 S.E.2d 691 (1968).

And the court is of further opinion that the trial court did not err in dismissing appellant's allegation XVI after review of the record without taking additional evidence. Whitley v. Commonwealth, 223 Va. 66, 286 S.E.2d 162 (1982).

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal. Code § 8.01-675.

The said circuit court shall allow court-appointed counsel the total fee set forth below and also their necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy
Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorneys' fee	$400.00 plus their costs and expenses
Filing fee	25.00

Teste:

Allen L. Lucy
Clerk

Commonwealth of Virginia

JAMES C. GODWIN
JUDGE
SUFFOLK, VIRGINIA 23434

BENJAMIN A. WILLIAMS, JR.
JUDGE
COURTLAND, VIRGINIA 23837

E. EVERETT BAGNELL
JUDGE
SUFFOLK, VIRGINIA 23434

Fifth Judicial Circuit

January 4, 1982

CITIES OF
SUFFOLK
FRANKLIN

COUNTIES OF
SOUTHAMPTON
ISLE OF WIGHT

Robert H. Anderson, III
Assistant Attorney General
900 Fidelity Building
830 East Main Street
Richmond, Virginia 23219

J. Lloyd Snook, III, Esquire
Attorney at Law
409 Park Street
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In Re: Willie Lloyd Turner v. Edward C. Morris, Superintendent

Gentlemen:

I have concluded that all of the issues raised in Willie Lloyd Turner's petition for habeas corpus, except those challenging the internal procedures of the Virginia Supreme Court, and ineffective assistance of counsel have already been decided by the Supreme Court on appeal.

As to the issue of whether or not the internal procedures of the Virginia Supreme Court are adequate for the protection of the petitioner's rights, this court has neither the authority nor the jurisdiction to decide it. This matter, if an issue at all, must be raised with the Virginia Supreme Court, not the Circuit Court. Based on the allegations in the petition, I could find nothing wrong with the procedures in any event.

Generally, a plenary hearing should be held to determine the issue of ineffective assistance of counsel but, in this instance, the focal point is on the treatment the attorneys gave the psychiatric testing and evaluation. A review of the record indicates that an independent, competent psychiatrist was allowed by the Court to evaluate Willie Lloyd Turner. The pertinent issues resulting from this testing and evaluation were raised by defense counsel. The problem with the psychiatrist's testimony was not due to ineffective assistance of counsel. Defense counsel very skillfully presented their psychiatric evidence to the Court and the jury, only to have the psychiatrist fail to hold up under vigorous cross-examination. This could not be pre-determined by defense counsel.

Having heard numerous pretrial motions, five days of actual trial, including many exceptions and motions made during and after trial, and after having reviewed the transcript, I find that the defendant, Willie Lloyd Turner, had excellent representation. His counsel were both experienced trial lawyers, competent to try the most serious criminal matters.

For the above reasons, I sustain the Motion to Dismiss the petition for a writ of habeas corpus and request the Attorney General to prepare the necessary order.

Yours very truly,

James C. Godwin

JCG:db
cc: Honorable Wayne M. Cosby, Clerk
Circuit Court of the
County of Southampton

W. R. Savage, III, Esquire
Attorney at Law

Thomas L. Woodward, Jr., Esquire
Attorney at Law

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF SOUTHAMPTON

WILLIE LLOYD TURNER,

Petitioner,

v.

EDWARD C. MORRIS, SUPERINTENDENT,

Respondent.

FINAL ORDER

On November 10, 1981, came J. Lloyd Snook, III, on behalf of petitioner and came also the respondent by counsel by James E. Kulp, Deputy Attorney General, and Robert H. Anderson, III, Assistant Attorney General, to be heard upon the respondent's Motion to Dismiss the petition for a writ of habeas corpus. After hearing oral argument by counsel and upon consideration thereof, the Court finds and is of the opinion that the Motion to Dismiss should be granted and the petition dismissed for the reasons stated in the Court's letter opinion of January 4, 1982, which, by this reference, is to be made a part of the record.

Now, therefore, for the reasons set forth, the Court ADJUDGES, ORDERS, and DECREES that the prayer of the petition for a writ of habeas corpus be denied and the petition dismissed, the writ discharged and the petitioner remanded forthwith to the custody of the respondent.

Counsel for petitioner has indicated his intention to appeal the decision of this Court to the Supreme Court of Virginia. On consideration whereof, the Court stays petitioner's execution for so long as he timely prosecutes his appeal from this order, and thereafter so long as the matter is under consideration by the Supreme Court of Virginia.

Let the Clerk certify copies of this Order to the petitioner, J. Lloyd Snook, III, counsel for petitioner, the respondent, and Robert H. Anderson, III, Assistant Attorney General.

Enter this 10th day of February , 1982.

James C. Godwin
Judge

I ask for this:

Robert H. Anderson III
Counsel for Respondent

Seen and object to:

J. Lloyd Snook III
Counsel for Petitioner

A Copy
Teste: Wayne W. Caug
By:

VIRGINIA

IN THE CIRCUIT COURT FOR THE COUNTY OF SOUTHAMPTON

WILLIE LLOYD TURNER,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

STATEMENT OF FACTS

Comes now your Petitioner, Willie Lloyd Turner, by counsel, and presents this Statement of Facts, pursuant to Rule 5:9 of the Supreme Court of Virginia. In addition to the matters already of record, Petitioner notes the following additional facts relating to the hearing on November 10, 1981:

1. Counsel for Petitioner and counsel for Respondent had agreed before the hearing that it would not be necessary or desirable to present evidence in support of or in opposition to Petitioner's allegations. The hearing was intended to allow the Court to determine whether a plenary hearing was necessary.

2. Since most of the issues were legal issues or were claims that had already been presented to and rejected by the Virginia Supreme Court, counsel focused the Court's attention on two issues:

a. Petitioner's allegation that the procedures of the Virginia Supreme Court for reviewing death sentences were inadequate, and

b. Petitioner's allegation of ineffective assistance of counsel.

3. In oral argument, which was not recorded or transcribed, counsel for Petitioner detailed the allegations of

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ineffective assistance of counsel, suggesting that counsel's ineffectiveness fit into two categories:

a. Failure to prepare for trial on the psychiatric issues by failing to research the psychiatric issues of the case; and

b. Failure to develop, with the help of Dr. Bransfield, ways to explain the concepts of the mitigating circumstances to a lay jury.

4. In oral argument, counsel outlined the evidence that he proposed to present in support of Petitioner's claim of ineffective assistance of counsel. Counsel offered to prove:

a. That defense counsel did not consult other psychiatrists or psychiatric experts in an effort to inform themselves about the psychiatric issues involved in this case.

b. That the only background research performed by defense counsel on psychiatric issues in preparation for trial was to review the selections from the American Psychiatric Association's Diagnostic and Statistical Manual, which had been sent to counsel by Dr. Bransfield with his letter of January 19, 1979.

c. That counsel did not consult with other psychiatrists in an effort to learn more about the psychiatric issues involved in this case.

d. That counsel did not research the prognostic implications of Dr. Bransfield's diagnosis.

e. That counsel did not research the case law of other states -- notably California -- in which the mitigating circumstances enumerated in the death penalty statute were defined.

f. That counsel did not prepare jury instructions defining the terms "extreme mental or emotional disturbance" or "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

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5. This offer of proof was not contested by counsel for Respondent.

WILLIE LLOYD TURNER

By Counsel

J. Lloyd Snook, III
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901

CERTIFICATE

I hereby certify that I have today mailed a copy of the foregoing Statement of Facts to Robert H. Anderson, Assistant Attorney General, 101 N. Ninth Street, Richmond, Virginia 23219.

J. Lloyd Snook, III

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APR 16 1983
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Supreme Court, U.S.
FILED
APR 11 1983
Alexander L. Stevas, Clerk

82-6579

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIE LLOYD TURNER,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Willie Lloyd Turner, by his counsel, moves this Court to grant him leave to proceed in forma pauperis with respect to his Petition for Writ of Certiorari, which Petition for Writ of Certiorari is filed contemporaneously herewith, representing unto the Court as follows:

1. Petitioner is unable to pay fees, costs or security for the Petition for Writ of Certiorari filed on Petitioner's behalf.

2. The nature of the Petition for Writ of Certiorari is to seek review of the judgment entered by the Supreme Court of Virginia affirming the imposition of the sentence of death upon your Petitioner for capital murder. Appellant was convicted under Va. Code Ann. §18.2-31 (1977 Cum. Supp.). He contends in his Petition for Writ Certiorari that he was denied the effective assistance of cousnel, guaranteed him under the Sixth and Fourteenth Amendments to the United States Constitution.

3. Appellant is filing the affidavit required by 28 U.S.C. §1915 contemporaneous with the filing of this application.

WILLIE LLOYD TURNER

By Counsel

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John C. Lowe
J. Lloyd Snook, III
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901

MAILING CERTIFICATE

I, J. Lloyd Snook, III, a member of the Bar of this Court, make oath that, on or before April 11, 1983, I caused this Motion for Leave to Proceed In Forma Pauperis, with the supporting affidavit, to be deposited in a United States post Office or mailbox, with First-Class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States Post Office or mailbox, with First-Class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2. I further make oath that I caused one copy of each of the above-mentioned documents to be sent to Robert H. Anderson, III, Assistant Attorney General, 101 North Eighth Street, Richmond, Virginia, 23219, by deposit in the United States Post Office mailbox, with First-Class postage prepaid.

J. Lloyd Snook, III

NOTARIAL CERTIFICATE

STATE OF VIRGINIA

AT LARGE, to-wit:

Sworn, subscribed and acknowledged before me this 11th day of April, 1983, by J. Lloyd Snook, III.

K. Taylor Powell
Notary Public

My commission expires: May 7, 1983

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82-6579

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WILLIE LLOYD TURNER,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Willie Lloyd Turner, having been duly sworn, do depose and say as follows:

1. I am the Petitioner in the above-entitled cause;

2. That I am indigent and unable to pay the fees and costs, or to give security for the fees and costs, associated with the prosecution of the attached Petition for Writ of Certiorari to the Supreme Court of Virginia;

3. That I was certified as an indigent at trial, and was appointed an attorney at that time;

4. That I pursued my appeal to the Supreme Court of Virginia as an indigent with court-appointed counsel, pursuant to the Rules of the Supreme Court of Virginia, and that I pursued my Petition for Writ of Certiorari in forma pauperis;

5. That I brought the Petition for Writ of Habeas Corpus in the Circuit Court for the County of Southampton, in forma pauperis, and that I pursued my appeal in the Supreme Court of Virginia from the denial of that Petition with court-appointed counsel;

6. That I have been incarcerated since my arrest on this charge four years ago;

7. That I am not presently employed, and have not

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been employed since before my arrest four years ago;

8. That I have not received income from any other source in the last twelve months, and I have no cash, bank accounts, or valuable property.

WHEREFORE, I respectfully pray this Court, pursuant to the attached Application to Proceed In Forma Pauperis, to allow me to file the attached Petition for Writ of Certiorari in forma pauperis.

Willie Lloyd Turner

NOTARIAL CERTIFICATE

STATE OF VIRGINIA

COUNTY OF MECKLENBURG, to-wit:

Subscribed, sworn and acknowledged before me this 7 day of April, 1983, by Willie Lloyd Turner.

Notary Public

My commission expires: June 15, 1985

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Office - Supreme Court, U.S.
FILED
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-6579

WILLIE LLOYD TURNER,

Petitioner,

v.

EDWARD C. MORRIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

GERALD L. BALILES
Attorney General of Virginia

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101 North Eighth Street
Richmond, Virginia 23219

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-6579

WILLIE LLOYD TURNER,

Petitioner,

v.

EDWARD C. MORRIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

OPINION BELOW

In an unpublished opinion, the Supreme Court of Virginia on January 11, 1983, denied and dismissed petitioner's appeal from the Circuit Court of the County of Southampton's dismissal of his petition for a writ of habeas corpus.

JURISDICTION

The petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTION PRESENTED

I. Did The Trial Court Err In Dismissing The Petition For A Writ Of Habeas Corpus In Lieu Of Conducting A Plenary Hearing?

STATEMENT OF THE CASE

The petitioner was convicted of capital murder for the slaying of a jewelry store owner in Franklin, Virginia, during the commission of an armed robbery and was sentenced

to death on December 6, 1979. The trial court upheld the jury's recommendation and entered a final order on February 6, 1980. Petitioner's conviction was affirmed in all respects by the Supreme Court of Virginia in Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980). After the state Supreme Court denied a petition for a rehearing, the petitioner subsequently filed a petition for a writ of certiorari in the Supreme Court of the United States. On May 21, 1981, the Supreme Court dismissed this petition. Turner v. Virginia, 451 U.S. 1011 (1981).

Petitioner then filed a petition for a writ of habeas corpus on September 9, 1981, in the Circuit Court of Southampton County. After respondent filed a motion to dismiss, a hearing was held in the Circuit Court on November 10, 1981, in which the propriety of dismissing the petition on the basis of the pleadings and existing record in lieu of a plenary hearing was argued. While there was no transcription of the hearing on November 10, 1981, each party pursuant to Rules 5:9, 5:10 and 5:11 of the Rules of the Supreme Court of Virginia filed a proposed statement of facts setting forth what had occurred. The Circuit Court adopted all of respondent's proposed statement and a portion of the statement filed by petitioner. See Appendix A-1 - A-7.

Concerning the claim that the trial attorneys had failed to adequately investigate or present expert psychiatric evidence on behalf of petitioner at the trial, counsel for petitioner proffered that the attorneys had not consulted with any psychiatrists or psychiatric experts other than Dr. Robert Bransfield (who testified for petitioner at the penalty stage of his trial) in attempting to familiarize themselves with the psychiatric issues presented in the case. The petitioner's attorney also said that he could establish that the trial attorneys had not adequately researched comparable capital murder statutes in various other jurisdictions regarding the definition and application of the mitigating

factors set forth in § 19.2-264.4B of the Code of Virginia, 1950, as amended. Counsel also stated that the ineffectiveness of the trial attorneys was shown by their failure to prepare a jury instruction defining the terms "extreme mental or emotional disturbance" or "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

In response, counsel for respondent referred the court to the testimony of Dr. Bransfield. Respondent argued that his direct testimony had been quite favorable to petitioner and that in particular he had been able to testify that petitioner had killed the decedent while under the influence of one of the mitigating factors set forth in § 19.2-264.4B. Respondent thus argued that the record established that on this issue, petitioner's trial attorneys had been effective in their representation.

On January 4, 1982, Circuit Court Judge Godwin issued a letter opinion in which he stated that he was sustaining respondent's motion to dismiss. On February 10, 1982, a final order was entered dismissing the petition for a writ of habeas corpus. This order was appealed to the Supreme Court of Virginia. By order of January 11, 1983, the Supreme Court dismissed the appeal. (Record No. 820828). The Court in part held that under the standards set forth in McMann v. Richardson, 397 U.S. 759 (1970), and Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978), the trial attorneys had been effective in their assistance. The Court further concluded that a plenary hearing had not been mandated.

ARGUMENT AGAINST GRANTING CERTIORARI

THE TRIAL COURT PROPERLY GRANTED RESPONDENT'S MOTION TO DISMISS WITHOUT FIRST CONDUCTING A PLENARY HEARING BECAUSE THE EXISTING RECORD ESTABLISHED THE ADEQUACY OF COUNSEL'S REPRESENTATION AT TRIAL.

In the present petition, petitioner challenges the effectiveness of trial counsel regarding the submission of

jury instructions and the introduction of psychiatric testimony on behalf of petition in the penalty stage of his trial. Respondent asserts that under the circumstances presented in this case, there was no need for a plenary hearing and the Circuit Court properly granted a motion to dismiss in the absence of such a hearing.

Initially, it is established that the failure of a state court to conduct a plenary hearing is not a federal question. See Welborn v. Cox, 337 F.Supp. 16 (W.D.Va. 1971). Pierce v. State of Oklahoma, 436 F.Supp. 1026, 1033 (W.D.Okla. 1977). Apart from this, respondent argues that petitioner has overstated the circumstances under which a plenary hearing will be required.

Respondent agrees that generally a hearing should be held where a petition alleges facts which, if proven, constitute grounds for habeas relief. However, it is not true "that every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing." Zambito v. Blair, 610 F.2d 1192 (4th Cir. 1979), cert. denied, 444 U.S. 928 (1980). Moreover, where the records of a habeas petitioner's criminal trial contain matters sufficient to refute the basic factual allegations underlying the petition, an evidentiary hearing is not mandatory. See Arey v. Peyton, 209 Va. 370, 164 S.E.2d 691 (1968); Larson v. Coiner, 351 F.Supp. 129 (N.D.W.Va. 1972). Finally, where an allegation on habeas corpus is patently frivolous or legally insufficient to justify relief even in the event that it can be proven, the petition may then be dismissed on the basis of the written pleadings. See generally Word v. Slayton, 337 F.Supp. 19 (W.D.Va. 1972); Younger v. Cox, 323 F.Supp. 412 (W.D.Va. 1971). See also Jackson v. Estelle, 548 F.2d 617 (5th Cir. 1977).

Respondent submits that the pre-existing record in the case at bar, along with the legal insufficiency of certain of the points raised by petitioner, were sufficient together

to justify the Circuit Court's conclusion that a plenary hearing was not required. The petitioner first argues that the trial attorneys failed to submit proposed jury instructions and otherwise insure that the jury would be fully instructed on the definitions and burdens of proof relating to the aggravating and mitigating factors applicable in the penalty stage of his trial. It is the position of the respondent, however, that the jury was properly instructed in accordance with applicable Virginia statutes.

Certainly, the jury was informed that the Commonwealth had the burden of proof beyond a reasonable doubt during the penalty stage of petitioner's criminal trial. Instruction 1 in the penalty stage told the jury that the Commonwealth was required to prove beyond a reasonable doubt either or both of the two (2) statutory aggravating circumstances set forth in § 19.2-264.2 of the Code of Virginia. See Appendix A-8. The Circuit Court further instructed the jury that if the Commonwealth proved beyond a reasonable doubt either of these two (2) alternatives, then it could, but was not obligated to, impose a sentence of death. If the Commonwealth failed to prove either alternative beyond a reasonable doubt, then the jury was required to fix petitioner's punishment at life. Likewise, Instruction 4 during the penalty stage instructed the jury on the applicable principles of law regarding the imposition of the death sentence. See Appendix A-9.

As for the complaint that the attorneys should have sought to define the aggravating and mitigating factors in instructions, respondent contends that decisions both of this Court and the Supreme Court of Virginia demonstrate that such a course of action would have been at best unnecessary and at worse futile. In Gregg v. Georgia, 428 U.S. 153 (1976), this Court upheld a statute identical to the "vileness" criterion set forth in § 19.2-264.2, rejecting any argument that the statute would be construed to impose death in all

murder cases. The Court stated: "[T]here is no reason to think that juries will not be able to understand it." Id. at 202 n 54. See also Jurek v. Texas, 428 U.S. 262 (1976). Similarly, in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135, cert. denied, 441 U.S. 967 (1979), the Supreme Court of Virginia upheld the facial constitutionality of both of the statutory aggravating factors. It is noteworthy that the limiting construction given by that Court in Smith to the term "aggravated battery" in the "vileness" factor was included in Instruction 1 in the penalty stage of petitioner's trial.

In considering the correctness of trial counsel's actions in the present case, respondent would also refer the Court to the decision in Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784, cert. denied, 444 U.S. 1049 (1980). There, the Supreme Court of Virginia stated: "We agree with the trial court that the terms used in the statute are commonly used and each has an accepted meaning. While the terms may have been defined in an instruction to the jury, in a manner satisfactory to this Court, the fact that the trial court did not choose to give such a definitional instruction does not constitute reversible error." 220 Va. 211. Respondent submits that if the trial court in the case at bar would not have been obligated to define the various aggravating factors beyond the language employed in the statute, certainly trial counsel could not be deemed constitutionally ineffective for not seeking such an amplification.

Respondent further asserts that there was no need on the part of petitioner's trial attorneys to provide definitions of the various mitigating factors. Certainly, any such definitions might have had the disadvantageous effect of placing a limiting gloss upon the otherwise broad language employed in the mitigating factors. Also, the evidence presented by petitioner at trial in mitigation of the offense related to the specific statutory factor that the crime had

been "committed while the defendant was under the influence of extreme mental or emotional disturbance." See infra. Respondent says that this term, like the aggravating language in Clark, supra, is one that is "commonly used" and which "has an accepted meaning." As in Clark, any further definition was not constitutionally mandated.

Respondent notes that in the present petition, petitioner cites no authority whatever to call into question the validity of the Supreme Court of Virginia's conclusion that these various terms require no further definition. In the absence of any such showing, petitioner can hardly establish the ineffectiveness of counsel for not proffering various instructions which would have been superfluous under established state law.

As to the claim that the trial attorneys did not adequately develop or present psychiatric testimony at petitioner's penalty stage, respondent says that the record clearly refutes any such contention. Dr. Robert C. Bransfield, a licensed psychiatrist who had examined petitioner on three (3) occasions after his arrest, testified in his behalf at the penalty stage of the proceedings. He stated that after petitioner had been placed on medication, he "showed an improvement in his depressive symptoms, and he showed an improvement in his psychotic tendencies after being placed on it." (December 5, 1979, Tr. 58). After describing petitioner's past history, which was both difficult and deprived, and also his recurring auditory illusions, Bransfield testified that his "final impression was anti-social personality with paranoid tendencies. He showed a combination of both paranoid tendencies and anti-social tendencies and I felt that the paranoid tendencies tended to come out more in times of stress . . . ." (Tr. 62). The psychiatrist then mentioned a number of personal difficulties suffered by petitioner shortly before the commission of the capital murder which resulted in petitioner "showing an

increased amount of paranoid symptoms at that time [which made him seem] like he was becoming more depressed and more rigid than he normally would have been . . . ." (Tr. 64). Bransfield further opined that if petitioner had been medically treated at the time of the homicide, he would not have killed the decedent. (Tr. 98). Most importantly, he was asked whether, based on his examination of petitioner and his review both of his past history and of the criminal acts charged against him, he had an opinion "with reasonable medical certainty as to whether this crime was committed while Willie Turner was under the influence of extreme mental or emotional disturbance." Bransfield testified that he felt petitioner "was under the influence of mental disturbance while he was committing the crime." (Tr. 69). This answer precisely tracked the statutory language contained in § 19.2-264.4B.

Respondent says that it is difficult to imagine testimony, which, if credited by the trier of fact, would be more likely to result in the lesser sentence of life imprisonment. This was obviously not a case akin to Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978), where the attorney failed to investigate or present at trial psychiatric testimony. On the contrary, this testimony was immensely helpful to petitioner. Present counsel for petitioner admitted as much on direct appeal to the Supreme Court of Virginia when they stated that "the psychiatric observations of Dr. Bransfield are helpful in assessing the degree of depravity or culpability" of petitioner in committing the capital murder. Opening Brief of Appellant at 46. (Record No. 800375).

Not surprisingly, Bransfield was subjected to vigorous cross-examination. Whatever difficulty he may have encountered during this cross-examination certainly had nothing to do with the alleged failure of defense counsel to consult with any psychiatric experts apart from Dr. Bransfield or to extensively research capital murder statutes in other

jurisdictions relative to the definition and application of the statutory mitigating factors set forth in § 19.2-264.4B. As the Circuit Court observed in its letter opinion of January 4, 1982, any problems encountered by Bransfield on cross-examination "could not be pre-determined by defense counsel." Respondent submits that the testimony of Bransfield, when considered in its totality, unambiguously demonstrates that at a minimum counsel presented evidence which created a significant issue of fact for the jury to consider in determining which penalty to impose upon petitioner. The fact that this testimony ultimately proved unavailing to petitioner does not render ineffective the assistance accorded him by his trial attorneys. Contrary to any intimation by petitioner, trial counsel who represent a capital defendant given a sentence of death are not ipso facto ineffective because of the penalty meted out.

Respondent also says that the record in no way supports petitioner's claim that Dr. Bransfield testified that petitioner would not be dangerous in the future, which in turn permitted the Commonwealth's Attorney to attempt to establish that petitioner presented such a danger. On the contrary, at no point during his entire testimony was Bransfield specifically asked to make any prediction as to petitioner's future dangerousness, nor did he ever express any such opinion. While his testimony certainly in some sense shed light on this issue, the same would be equally true of almost any evidence presented by either side in any capital case during the penalty stage. Any evidence relative to a defendant's background, or the nature of the acts that he has been found to have committed is in some sense indicative of the future menace that he may pose to society. In the case at bar, however, what directly tended to establish petitioner's future dangerousness was the introduction of his extensive criminal record, which was introduced by the Commonwealth well before any testimony by Bransfield.

Finally, given the nature of the testimony that was introduced by defense counsel at petitioner's trial, when petitioner nevertheless asserts that the attorneys were not effective, it becomes clear that he is imposing upon counsel in capital cases a vague, thoroughly ill-defined and ultimately unsustainable burden. In any capital case where a death sentence is given, it can always be argued that if one more psychiatrist had been called as a defense witness or one other statute from a foreign jurisdiction had been consulted and relied upon, a life sentence would have thereby resulted. However, a line must be drawn at some place; in determining the issue of an attorney's effectiveness, a court must at some point conclude that certain actions, even if theoretically helpful, are not constitutionally mandated. Respondent submits that the acts of omission complained of by petitioner in the present case are actions that were not constitutionally obligatory upon petitioner's trial lawyers.

In this regard, it should be noted that an attorney is not invariably required to investigate or raise an insanity defense. See Proffitt v. United States, 582 F.2d 854 (4th Cir. 1978). See also Springer v. Collins, 586 F.2d 329 (4th Cir. 1978). In considering whether an attorney has been incompetent in his presentation of an insanity defense, a court should remember that counsel is not ineffective even though he may have made an undesirable tactical decision at trial. See United States ex rel Heral v. Franzen, 667 F.2d 633 (7th Cir. 1981). Counsel should not be second guessed on stategy as basic as the examination of a witness. See Sallie v. State of North Carolina, 587 F.2d 636 (4th Cir. 1978). A habeas corpus petitioner has a heavy burden to establish that his trial attorney was ineffective and that he was impermissibly prejudiced as a result of such incompetence. See Drake v. Wyrick, 640 F.2d 912 (4th Cir. 1981). As one court has stated: "[C]omplaints of uncalled witnesses are not favored, because a presentation of testimonial evidence

is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative." Boyd v. Estelle, 661 F.2d 388 (5th Cir. 1981).

In considering the claims in the present petition, this Court should keep these various principles in mind. Respondent says that petitioner's trial attorneys should not be held ineffective on the basis of the sheerest sort of speculation as to what other unnamed witnesses might have testified to. In this regard, respondent would refer this Court to the decision in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). There, the court in holding that a capital murder defendant given the death sentence had received effective representation by his attorney ruled that the legal standard applicable in judging the adequacy of counsel was the same in both non-capital and capital cases. On the issue of an attorney's duty to investigate in a capital case, the court offered the following observation highly pertinent to the case at bar:

> "This duty to investigate and prepare is . . . far from limitless, and not every breach thereof will mean that counsel has failed to render reasonably effective assistance . . . . [C]ounsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers . . . . [C]ounsel's effectiveness may not be assessed through the finely ground lens of 20-20 hindsight -- and this command is especially compelling in reviewing claims of ineffective assistance that are grounded in allegations of inadequate investigation and preparation." 655 F.2d 1356.

Finally, it is the position of respondent that petitioner's recommended form of relief in this case -- namely, that the matter be remanded to the state circuit court for a plenary hearing -- is not well-taken. Supposedly, such a state hearing would serve to effectuate such "federal policies" as federalism, comity and judicial economy.

Respondent submits that plenary hearings should be required not on the ground of "policies" but rather only on the basis of the inadequacy of the existing record and the pleadings in the case. Respondent would also argue that

none of the expressed concerns of petitioner would be served by a return to the state courts in this case.

It is not correct to assert that the courts in Virginia have failed or refused to consider the claimed ineffectiveness of petitioner's trial counsel. On the contrary, both the Circuit Court and the Supreme Court of Virginia have reviewed the record and the pleadings and have determined that in fact petitioner did receive competent assistance of counsel. The mere fact that these courts have made this determination in a context other than that advocated by petitioner does not mean that these courts have not addressed this issue. Federalism and comity are hardly served by requiring a state to consider an issue for a second time after it has already dismissed it on the merits. Likewise, judicial economy can hardly obtain in this case when it might reasonably be anticipated that in the event of a state plenary hearing resulting in the dismissal of the habeas corpus petition, petitioner would then seek a second evidentiary hearing in a federal forum.

CONCLUSION

For the reasons presented, the respondent respectfully contends that the issues raised in this case are neither important nor substantial and accordingly asks this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

GERALD L. BALILES
Attorney General of Virginia

ROBERT H. ANDERSON, III
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that I, Robert H. Anderson, III, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 11th day of May, 1983, I mailed, with first class postage

prepaid, a copy of the Respondent's Brief in Opposition to Granting of Writ of Certiorari to J. Lloyd Snook, III, Lowe, Gordon, Jacobs & Snook, Ltd., 409 Park Street, Charlottesville, Virginia 22901, counsel for petitioner.

Robert H. Anderson III

Robert H. Anderson, III
Assistant Attorney General

APPENDIX

VIRGINIA

IN THE CIRCUIT COURT FOR THE COUNTY OF SOUTHAMPTON

WILLIE LLOYD TURNER,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

STATEMENT OF FACTS

Comes now your Petitioner, Willie Lloyd Turner, by counsel, and presents this Statement of Facts, pursuant to Rule 5:9 of the Supreme Court of Virginia. In addition to the matters already of record, Petitioner notes the following additional facts relating to the hearing on November 10, 1981:

1. Counsel for Petitioner and counsel for Respondent had agreed before the hearing that it would not be necessary or desirable to present evidence in support of or in opposition to Petitioner's allegations. The hearing was intended to allow the Court to determine whether a plenary hearing was necessary.

2. Since most of the issues were legal issues or were claims that had already been presented to and rejected by the Virginia Supreme Court, counsel focused the Court's attention on two issues:

a. Petitioner's allegation that the procedures of the Virginia Supreme Court for reviewing death sentences were inadequate, and

b. Petitioner's allegation of ineffective assistance of counsel.

3. In oral argument, which was not recorded or transcribed, counsel for Petitioner detailed the allegations of

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ineffective assistance of counsel, suggesting that counsel's ineffectiveness fit into two categories:

a. Failure to prepare for trial on the psychiatric issues by failing to research the psychiatric issues of the case; and

b. Failure to develop, with the help of Dr. Bransfield, ways to explain the concepts of the mitigating circumstances to a lay jury.

4. In oral argument, counsel outlined the evidence that he proposed to present in support of Petitioner's claim of ineffective assistance of counsel. Counsel offered to prove:

a. That defense counsel did not consult other psychiatrists or psychiatric experts in an effort to inform themselves about the psychiatric issues involved in this case.

b. That the only background research performed by defense counsel on psychiatric issues in preparation for trial was to review the selections from the American Psychiatric Association's Diagnostic and Statistical Manual, which had been sent to counsel by Dr. Bransfield with his letter of January 19, 1979.

c. That counsel did not consult with other psychiatrists in an effort to learn more about the psychiatric issues involved in this case.

~~d. That counsel did not research the prognostic implications of Dr. Bransfield's diagnosis.~~

e. That counsel did not research the case law of other states -- notably California -- in which the mitigating circumstances enumerated in the death penalty statute were defined.

f. That counsel did not prepare jury instructions defining the terms "extreme mental or emotional disturbance" or "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

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~~5. This offer of proof was not contested by counsel for Respondent.~~

WILLIE LLOYD TURNER

By Counsel

J. Lloyd Snook, III
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901

CERTIFICATE

I hereby certify that I have today mailed a copy of the foregoing Statement of Facts to Robert H. Anderson, Assistant Attorney General, 101 N. Ninth Street, Richmond, Virginia 23219.

J. Lloyd Snook, III

June 3, 1982

James C. Gordon

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VIRGINIA:

IN THE CIRCUIT COURT OF SOUTHAMPTON COUNTY

WILLIE LLOYD TURNER,

Petitioner,

v.

EDWARD C. MORRIS,

Respondent.

STATEMENT OF FACTS

1. The purpose of the hearing was to afford counsel for each party the opportunity to present legal arguments as to whether respondent's motion to dismiss the habeas corpus petition should be granted in lieu of having a plenary hearing.

2. At the outset of the hearing, counsel for petitioner acknowledged that the only grounds that had not previously been raised either at trial or on direct appeal to the Supreme Court of Virginia and thus which were now reviewable were the matters contained in allegations (2), (3), (12) and (16) in the petition. Counsel then presented arguments concerning allegations (2), (12) and (16). No arguments regarding allegation (3) were presented by either party.

3. With respect to allegation (2), counsel for petitioner referred to a study which was under preparation and which was alleged to deal with the application of the death penalty in Virginia. Counsel stated that he hoped that the study would be ready in two to three weeks but was unable to represent to the Court when it might be available and also was not in the

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position to indicate what the ultimate findings were likely to be. Counsel additionally stated that trial counsel for petitioner had known nothing about such a pending study at the time of the trial.

4. With respect to allegation (12), counsel for petitioner presented various arguments in support of his claim that trial counsel had failed to adequately investigate or present expert psychiatric evidence on behalf of petitioner at trial. In part, counsel proffered that defense counsel had not consulted any psychiatrists or psychiatric experts other than Dr. Bransfield in attempting to familiarize themselves with the psychiatric issues involved in the case. Counsel also offered to establish that the trial attorneys had not adequately researched comparable capital murder statutes in various other jurisdictions regarding the definition and application of the mitigating factors set forth in § 19.2-264.4B of the Code of Virginia (1950), as amended. Petitioner's attorney also challenged the failure of trial counsel to prepare jury instructions defining the terms "extreme mental or emotional disturbance" or "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

5. In response to these arguments, counsel for respondent referred the court to the testimony of Dr. Robert Bransfield, a witness for petitioner. Dr. Bransfield was permitted on direct examination to testify that in his view petitioner was under the influence of mental disturbance while he was committing the crime. It was pointed out that this answer precisely tracked the language set forth in § 19.2-264.4B.

6. With respect to allegation (16), counsel for the opposing parties briefly presented arguments consistent with the contentions advanced in the petition for a writ of habeas corpus and Motion to Dismiss, respectively.

7. At the conclusion of the hearing, the Court indicated that it would take the case under advisement. By order of February 10, 1982, the court denied and dismissed the petition.

June 3, 1982

James C. Godbold

Commonwealth of Virginia

JAMES C. GODWIN
JUDGE
SUFFOLK, VIRGINIA 23434

BENJAMIN A. WILLIAMS, JR.
JUDGE
COURTLAND, VIRGINIA 23837

E. EVERETT BAGNELL
JUDGE
SUFFOLK, VIRGINIA 23434

Fifth Judicial Circuit

CITIES OF
SUFFOLK
FRANKLIN

COUNTIES OF
SOUTHAMPTON
ISLE OF WIGHT

June 3, 1982

Robert H. Anderson, III, Esquire
Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

J. Lloyd Snook, III, Esquire
Attorney at Law
409 Park Street
Charlottesville, Virginia 22901

In Re: Willie Lloyd Turner v. Edward C. Morris

Gentlemen:

With regard to statements of facts filed on behalf of both the Petitioner and the Respondent in the above captioned matter, I am today signing both statements of facts but sustaining Respondent's objection to (4-d) and (5) in Petitioner's proposed statement of facts. The statements of facts will be mailed today to the Clerk of the Supreme Court.

Yours very truly,

James C. Godwin

JCG:dee

Instr. 1
2nd stage

#1

INSTRUCTION 1

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following alternatives:

(1) That, after consideration of his past criminal record, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

(2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

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Inst. 4 2nd stage

#4

INSTRUCTION 4

The Court instructs the jury that in this proceeding, as in the former where you determined the guilt of the defendant, the burden is upon the Commonwealth to prove each and every fact required for imposition of the death penalty, as set forth in other instructions of this Court, by evidence so strong, so clear, and so conclusive that there is left in the minds of the jury no reasonable doubt. Where the evidence is susceptible to two interpretations, one consistent with the imposition of the death penalty, and the other with the imposition of life imprisonment, you should not adopt that interpretation which is consistent with imposition of the death penalty.

If, therefore, upon a consideration of all the evidence, there exists in your minds a reasonable doubt as to any fact or conclusion you are required to find before the death penalty may be imposed, you shall recommend a sentence of life imprisonment.